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In The

Supreme Court of the United States

CARLOS CAMPOS,

Petitioner,

v.

THE STATE OF TEXAS,

Respondent.

On Petition For A Writ Of Certiorari To The Texas Court Of Criminal Appeals

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Whether the Texas Court of Criminal Appeals erroneously applied the deficient performance prong of *Strickland v. Washington*, 466 U.S. 668 (1984), in holding that trial counsel could have made a reasonable strategic decision not to impeach a key prosecution witness where counsel did not know about the impeachment evidence and testified that, had he known about it, he would have impeached the witness.

2. Whether the Texas Court of Criminal Appeals erroneously applied the prejudice prong of *Strickland v. Washington*, 466 U.S. 668 (1984), in holding that trial counsel's failure to impeach a different key prosecution witness did not affect the outcome of the trial.

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PETITION FOR A WRIT OF CERTIORARI

Carlos Campos respectfully petitions for a writ of certiorari to review the judgment of the Texas Court of Criminal Appeals.

OPINIONS BELOW

The opinion of the Texas Court of Criminal Appeals (TCCA) denying habeas corpus relief is not reported (Appendix A). The findings of fact and conclusions of law of the 179th District Court of Harris County is not reported (Appendix B). The order of the TCCA denying rehearing is not reported (Appendix C).

JURISDICTION

The TCCA denied habeas corpus relief on December 16, 2009, and denied rehearing on February 3, 2010. This petition is being filed within 90 days of the denial of rehearing. This Court has jurisdiction pursuant to 28 U.S.C. § 1257(a).

CONSTITUTIONAL PROVISIONS

The Sixth Amendment to the United States Constitution provides, in pertinent part, "In all criminal prosecutions, the accused shall enjoy . . . the Assistance of Counsel for his defence."

The Fourteenth Amendment to the United States Constitution provides, in pertinent part, "No State shall . . . deprive any person of liberty . . . without due process of law. . . ."

STATEMENT OF THE CASE

A. Summary Of The Issues

Alexander Pacheco and Luis Rolden watched a basketball game on television and drank beer at Pacheco's home on the night of June 2, 1994 (3 R.R. 182-84).[1] Pacheco dropped off Rolden at a store to rent a movie while he went to a convenience store in the same shopping center to buy more beer (3 R.R. 183-84.)

David Payne, a friend of petitioner's, was the clerk on duty at the convenience store (4 R.R. 9-10). Petitioner; his girlfriend, Madelynn Longoria; and Pacheco entered the store about the same time (4 R.R. 10-11). Payne and petitioner spoke about a basketball game they had seen on television and going to shoot petitioner's gun at a range; petitioner appeared to be in a good mood (4 R.R. 17-18, 54). Petitioner and Longoria went to the soda machine, and Pacheco went to the beer cooler (4 R.R. 24). Pacheco brought two quart bottles of beer to the

[1] Pacheco's blood alcohol level at the time of the autopsy was 0.045 (4 R.R. 98).

counter.[2] When Payne asked Pacheco for identification, petitioner commented that Pacheco did not look like he was 21 years old (4 R.R. 25).[3] Pacheco said, "Who asked you?" (4 R.R. 25). Petitioner responded, "Your daddy" (4 R.R. 26). Pacheco said, "That shows what you know, I don't have a daddy." Petitioner responded, "I'll show you how much I know," and left the store (4 R.R. 26-27). Pacheco asked Payne whether petitioner carried a gun (4 R.R. 28). Payne said, "No." Pacheco said that he was wondering what petitioner went outside to get (4 R.R. 30). Pacheco then went outside, followed by Payne (4 R.R. 31).

Five people observed the shooting; three testified for the State and two for the defense. Their accounts differed.

Payne testified that Pacheco walked to a trash can; threw away an empty beer bottle; approached Longoria's car with a full quart bottle of beer in each hand; and, as he stood at the passenger door, raised both bottles (4 R.R. 34, 36, 68, 70).[4] A gunshot was fired (4 R.R. 43).

Rodney Mueller, an inspector for the United States Department of Agriculture, testified that he was at the gas pump when petitioner and Longoria

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[2] A camera recorded what happened at the counter (6 R.R. SX 33).

[3] Pacheco was 20 years old (6 R.R. SX 36).

[4] Payne thought that Pacheco was about to hit petitioner (4 R.R. 79).

left the store and got into a car (3 R.R. 68, 72, 75-78). Pacheco left the store carrying beer bottles, approached the car without raising the bottles, and leaned over as if about to speak; petitioner shot him (3 R.R. 79-83, 123).[5] There was no indication that anyone was angry until the gunshot was fired (3 R.R. 111). Mueller ran behind a building and saw petitioner smiling (3 R.R. 84-85). Longoria backed her car into Mueller's car and drove away (3 R.R. 85, 87). Mueller drove home and called 911 (3 R.R. 88).

Sean Aveilhe testified that he and a friend went to the store to buy beer (3 R.R. 129-31). Aveilhe saw Pacheco leave the store, throw something away, approach the pumps, make a 90-degree turn, and approach Longoria's car (3 R.R. 139-41).[6] Pacheco, with a beer bottle in each hand, asked petitioner, "Were you talking shit to me?" but did not raise the bottles (3 R.R. 142, 144, 161). Petitioner said, "Yes," and a gunshot was fired within two seconds (3 R.R. 144, 146). Petitioner told the driver to go, and the car drove away (3 R.R. 147-48). Pacheco appeared to be dead (3 R.R. 150-51). Aveilhe called the sheriff's office but left before the officers arrived because there was

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[5] Mueller's testimony was inconsistent regarding the distance between Pacheco and petitioner at the time of the shooting. He testified on direct examination that Pacheco was within two feet of the car (3 R.R. 83). He testified on cross-examination that Pacheco's hands were on the edge of the car (3 R.R. 96).

[6] Aveilhe knew Pacheco from school (3 R.R. 130).

an outstanding warrant for his arrest (3 R.R. 151, 172). Aveilhe was not impeached in any significant respect.

When the officers arrived, Pacheco was dead (3 R.R. 12-13).[7] There were broken beer bottles and a nine-millimeter shell casing in the parking lot (3 R.R. 38, 43, 47, 65).[8] The officers obtained the store videotape (3 R.R. 17).

Pacheco's sister, Lulu, went to the sheriff's office that night to look at the videotape (3 R.R. 194). She recognized petitioner, whom she had known since elementary school, and Longoria (3 R.R. 195-96, 199).[9] She told the police where they lived (3 R.R. 200).

Petitioner was arrested at Longoria's home the next morning (4 R.R. 101-04). Longoria led an officer to bushes outside a vacant house near the store, where the gun that shot Pacheco was hidden (4 R.R. 104-09, 122-26).

Petitioner and Longoria were the only defense witnesses. They were 17 years old and were boyfriend and girlfriend on the night in question (5 R.R. 3-4,

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[7] Pacheco died from a gunshot wound to the head (4 R.R. 87, 91, 93).

[8] An officer and a pathologist testified that a beer bottle can be a deadly weapon (3 R.R. 66; 4 R.R. 95-96).

[9] Payne watched the videotape that night and falsely denied knowing petitioner's name because he did not want petitioner to get in trouble (4 R.R. 45-48).

103). Petitioner had just completed his sophomore year of high school (5 R.R. 103).

A friend told petitioner on June 1, 1994, that he hid a gun in a particular place when the police raided a party (5 R.R. 104). Petitioner retrieved the gun, loaded the clip, and placed the gun under the front passenger seat and the clip in the glove compartment of Longoria's car (5 R.R. 105-12).

On the night of June 2, 1994, petitioner and Longoria ran track at their high school, had sex in her car, and went to the store for sodas (5 R.R. 4-5, 60-61, 113-14). Petitioner was speaking to Payne, and Longoria was getting a soda, when Pacheco entered the store drinking a beer (5 R.R. 6-8, 119). When Pacheco attempted to buy more beer, Payne asked for his driver's license (5 R.R. 9-11, 122-24). Petitioner said that, if the license did not have a red "under 21" stamp, Payne could sell him the beer (5 R.R. 12, 124). Pacheco said to petitioner, "Who asked you?" (5 R.R. 13, 124). Petitioner responded, "Your daddy" (5 R.R. 13, 124). Pacheco said, "I don't have a daddy. Shows how much you fucking know, asshole" (5 R.R. 14, 125). Petitioner responded, "I'll show you what I know," and left the store (5 R.R. 14, 125).

Petitioner waited in the parking lot for Pacheco to leave the store so they could fight (5 R.R. 125-26). Longoria told petitioner that she wanted to leave (5 R.R. 17, 128). Longoria got in the driver's seat of her car, and petitioner got in the passenger's seat (5 R.R. 129).

Pacheco left the store, went to a trash can, and approached the car holding a beer bottle upside down by the neck in each hand (5 R.R. 19-20, 133-35). Petitioner told Longoria to go (5 R.R. 20-21, 132). Pacheco said, "Do you want some fucking shit?" and raised the bottles (5 R.R. 22-23, 132, 135). Petitioner, believing that Pacheco was about to hit him in the head with the bottles and fearing for his life, put the clip in the gun and pulled back the slide; and the gun discharged (5 R.R. 33, 135-39, 160-61).[10] Pacheco fell to the ground, and the bottles broke (5 R.R. 33, 139-40). Petitioner again told Longoria to go (5 R.R. 35, 141). After backing into a car parked at the pump, she drove away (5 R.R. 36, 141-42).

Petitioner hid the gun in bushes next to a house near the store (5 R.R. 36-38, 143). He spent the night at Longoria's home, where the police arrested him the next morning (5 R.R. 40, 46-47, 144, 154-55).

Lynn Harris testified in rebuttal that she knew the Pacheco family and also knew petitioner from high school (5 R.R. 200, 211-12).[11] Harris saw petitioner at a party in May of 1994 (5 R.R. 200-01). Petitioner took a friend's hand, put it on his stomach, and said, "I don't have to worry about nothing . . . I'm

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[10] Petitioner intended to show the gun to Pacheco in an effort to stop him but did not intend to shoot him (5 R.R. 136, 139).

[11] Harris's brother, Michael, went to the Pacheco home after the shooting (5 R.R. 212-13).

just waiting for someone to talk shit to me" (5 R.R. 205). When the police arrived to break up the party, petitioner became nervous, started fidgeting with his clothes, and said, "What am I going to do? I got this 'gat'" (5 R.R. 207).[12] Harris saw the handle of a gun under his shirt. Harris did not tell anyone about the incident at the time; when she heard that Pacheco had been shot, she contacted the district attorney's office (5 R.R. 210-11, 213). The prosecutor argued at the guilt-innocence stage that Harris's testimony demonstrated that the shooting was premeditated rather than in self-defense; and argued at the punishment stage that petitioner should receive a life sentence because he had wanted to kill someone since that party (5 R.R. 246; 6 R.R. 47).

The court instructed the jury on murder, involuntary manslaughter, negligent homicide, and self-defense (C.R. 66-72). The jury convicted petitioner of murder and assessed his punishment at life imprisonment (C.R. 91-92).

Petitioner obtained during the post-conviction investigation court records reflecting that Aveilhe pled guilty to possession with intent to deliver LSD, a second degree felony, and was placed on deferred adjudication probation for five years in 1991 in Galveston County, Texas (1 H.C.R. 92-97). The State filed a motion to adjudicate guilt in 1992 (1 H.C.R.

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[12] Harris explained that "gat" is slang for gun (5 R.R. 207).

98-102). There was a warrant for his arrest on the night of the shooting and at the time of both trials.[13]

Petitioner also obtained court records reflecting that Harris pled guilty to burglary of a habitation, a second degree felony, without an agreed recommendation on punishment, and the court placed her on deferred adjudication probation for six years in March of 1994 in Harris County, Texas (1 H.C.R. 124-28). The State filed a motion to adjudicate guilt in February of 1995 (1 H.C.R. 129-30). There was a warrant for her arrest when she testified in June of 1995.[14]

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[13] Harry Fleming, the lawyer for the Pacheco family in their wrongful death lawsuit against the owner of the convenience store, deposed Aveilhe in the civil case in September of 1994 (1 H.C.R. 86-91). Three months after the retrial, Fleming represented Aveilhe in the criminal proceeding (1 H.C.R. 104). The State's initial offer was five years in prison (1 H.C.R. 103). Ultimately, the State agreed to "shock" probation and dismissed the motion to adjudicate guilt; the court placed Aveilhe on probation for ten years on December 1, 1995, with the condition that he spend 90 days in a substance abuse treatment facility (1 H.C.R. 104-23).

[14] Four days after petitioner was sentenced to life imprisonment, the motion to adjudicate Harris's guilt and her probation were transferred to North Carolina (1 H.C.R. 131-32). Two years later, the State filed another motion to adjudicate guilt; she pled true and was sentenced to five years in prison (1 H.C.R. 133-39). Carrie Wellmaker, a private investigator hired by petitioner, testified by affidavit in the state habeas corpus proceeding that she interviewed Harris in June of 2005. Harris said that her father, who lived in North Carolina, became very ill during December of 1994. The court refused to transfer her

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The trial court had ordered the State to disclose to the defense the criminal record of each prosecution witness (C.R. 25, 27). Defense counsel Tom Lambright testified by affidavit in the state habeas corpus proceeding that the State did not disclose that Aveilhe and Harris had criminal records and that he relied on the court order instead of conducting an independent investigation to discover their criminal records. As a result, he did not know that they were on felony deferred adjudication probation and had pending motions to adjudicate guilt and outstanding arrest warrants. Had he known, he would have elicited this evidence on cross-examination to demonstrate their bias and motive (1 H.C.R. 57-60).

Petitioner filed a state habeas corpus application alleging that Lambright was ineffective in failing to

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probation to North Carolina so she could be with him. She went to North Carolina anyway, recognizing that she was violating her probation and probably would have to face the consequences. A private investigator for the Pacheco family located her. She agreed to return to Houston to testify at petitioner's retrial in June of 1995; she did not testify at the first trial in January of 1995. The prosecutor told her that there was a warrant for her arrest on a motion to adjudicate guilt; although she would not be arrested, she would have to see the judge about her probation violation after she testified. He said that he would arrange for her to talk to the judge without going to jail, although he did not know what decision the judge would make regarding her probation. Shortly after she testified against petitioner, he arranged for her to talk to the judge; the civil lawyer for the Pacheco family accompanied her. She explained why she left Texas. The court overruled the motion to adjudicate guilt and transferred her probation to North Carolina (1 H.C.R. 140-41).

impeach Aveilhe and Harris with their pending motions to adjudicate guilt and outstanding arrest warrants. The claim was developed through affidavits and documentary evidence.

The TCCA held that Lambright did not perform deficiently in failing to impeach Harris. It speculated that he could have decided not to impeach her because her testimony was consistent with a statement she gave to the authorities before she violated the terms of her probation. *App.* 21-22. It erroneously applied the deficient performance prong of *Strickand v. Washington*, 466 U.S. 668 (1984), in holding that Lambright could have made a reasonable strategic decision not to impeach Harris where he did not know about the impeachment evidence and testified that, had he known about it, he would have impeached her.

The TCCA held that Lambright performed deficiently in failing to impeach Aveilhe but that there was no prejudice because the State did not need his testimony. *App.* 25-26. It erroneously applied the prejudice prong of *Strickland*, which requires a reviewing court to determine whether there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different. The cumulative effect of Lambright's failure to impeach Harris and Aveilhe undermines confidence in the outcome of the trial. Thus, a summary reversal is warranted. *See Porter v. McCollum*, 130 S.Ct. 447 (2009) (conviction summarily reversed because court of appeals erroneously applied prejudice prong of *Strickland*).

B. Procedural History

Petitioner pled not guilty to murder in cause number 9412877 in the 179th District Court of Harris County. His first trial resulted in a deadlocked jury on January 9, 1995 (C.R. 54).[15] A jury convicted him at the retrial and assessed his punishment at life imprisonment on June 23, 1995.

The Fourteenth Court of Appeals affirmed the conviction in an unpublished opinion issued on June 5, 1997. The Court of Criminal Appeals refused discretionary review on December 17, 1997. *Campos v. State*, 1997 WL 295361 (Tex. App. – Houston [14th Dist.] 1997, pet. ref'd).[16]

Petitioner filed a *pro se* federal habeas corpus petition in the Southern District of Texas in cause number H-98-3949 on November 23, 1998, alleging that both trial and appellate counsel were ineffective. He filed a second *pro se* petition in cause number H-98-4027 on November 25, 1998, which was assigned to a different judge. The court dismissed cause

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[15] According to Lambright, a slim majority of the jurors favored acquittal (1 H.C.R. 57).

[16] Six days after the incident, Pacheco's family filed a wrongful death lawsuit against National Convenience Stores, Inc., alleging that the negligence of the clerk was a proximate cause of the death (1 H.C.R. 67-75). That lawsuit was tried to a jury in March of 1996, less than a year after petitioner was convicted. The jury found that Pacheco was 80 per cent negligent and Payne was 20 per cent negligent. Accordingly, the trial court entered a take-nothing judgment (1 H.C.R. 76-79).

number H-98-3949 on November 1, 1999, because petitioner had not exhausted his state remedies. Petitioner filed a motion to dismiss cause number H-98-4027 on November 22, 1999, so he could exhaust his state remedies. The court dismissed the petition without prejudice on December 7, 1999.

Petitioner, represented by counsel, filed a state application for a writ of habeas corpus on November 17, 2005. The trial court signed the State's proposed findings of fact and conclusions of law and recommended that relief be denied on July 16, 2007. The TCCA remanded the case for additional evidence and findings on May 14, 2008. The trial court again signed the State's proposed findings of fact and conclusions of law and recommended that relief be denied on December 2, 2008. *App.* B. The TCCA set the case for submission on two ineffective assistance of counsel claims and ordered briefing. It denied relief in an unpublished opinion issued on December 16, 2009. *App.* A. It denied rehearing on February 3, 2010. *App.* C. *Ex parte Campos*, 2009 WL 4931883 (Tex. Crim. App. 2009).

REASONS FOR GRANTING THE PETITION

I. THE TEXAS COURT OF CRIMINAL APPEALS ERRONEOUSLY APPLIED THE DEFICIENT PERFORMANCE PRONG OF *STRICKLAND V. WASHINGTON* IN HOLDING THAT TRIAL COUNSEL COULD HAVE MADE A REASONABLE STRATEGIC DECISION NOT TO IMPEACH A KEY PROSECUTION WITNESS WHERE COUNSEL DID NOT KNOW ABOUT THE IMPEACHMENT EVIDENCE AND TESTIFIED THAT, HAD HE KNOWN ABOUT IT, HE WOULD HAVE IMPEACHED THE WITNESS.

The TCCA held that Lambright did not perform deficiently in failing to impeach Harris. It speculated that he could have decided not to impeach her and that the jury would have believed her even had she been impeached. It observed that the inference that her testimony against petitioner resulted from her status as a probationer might be negated because she gave a statement to the authorities before she violated the terms of her probation. Thus, Lambright reasonably could have believed that her status as a probationer did not influence her and decided not to impeach her. *App.* 21-22.[17]

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[17] The TCCA also observed that Jean Dugas testified at the first trial that petitioner had the gun at the party. *App.* 14-15. That Dugas's testimony at the first trial was similar to Harris's testimony at the retrial does not mean that either of them was telling the truth. More importantly, Dugas's prior testimony does

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The TCCA did not decide the case based on the evidence in the record; instead, it decided the case based on a hypothetical scenario not supported by the evidence. Had Lambright testified that he knew Harris was on probation and had a pending motion to adjudicate guilt and an outstanding arrest warrant but decided not to impeach her because her testimony was consistent with her statement to the authorities, a reviewing court would determine whether his strategic decision not to impeach her was reasonable. However, he testified that he did not know about her criminal record and that, had he known she was on deferred adjudication probation for burglary of a habitation and had a pending motion to adjudicate guilt and an outstanding arrest warrant, he "would have elicited it on cross-examination to show her bias and motive" (1 H.C.R. 60). There was no factual basis for the TCCA to conclude that he could have made a reasonable strategic decision not to impeach her with this evidence.[18] It ignored this Court's precedent that

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not impact whether Lambright performed deficiently in failing to impeach Harris, as Dugas did not testify at the retrial.

[18] The TCCA's analysis of its case law addressing whether a defendant has a Sixth Amendment right to impeach a prosecution witness with her status as a probationer was irrelevant to whether Lambright performed deficiently. *App.* 18-20. Lambright did not testify that he failed to impeach Harris because he believed that the evidence was inadmissible under *Carmona v. State*, 698 S.W.2d 100 (Tex. Crim. App. 1985), and *Callins v. State*, 780 S.W.2d 176 (Tex. Crim. App. 1989). These cases did not support the exclusion of evidence of a witness's pending motion to adjudicate guilt and outstanding arrest

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counsel cannot make a reasonable strategic decision not to elicit favorable evidence that he does not know about as a result of an inadequate investigation. *See Wiggins v. Smith*, 539 U.S. 510, 523-24 (2003).

Even the strategic reason that the TCCA created for Lambright – that he could have decided not to impeach Harris because her testimony was consistent with her statement to the authorities – does not pass muster. Lambright challenged Harris's credibility by eliciting that she knew the Pacheco family and did not tell anyone about petitioner's alleged conduct at the party until after Pacheco was shot (5 R.R. 210-12). Thus, Lambright had no strategic reason not to elicit testimony that would have enabled him to argue to the jury that Harris gave this statement because of her vulnerable status as a probationer in the hope that it might benefit her in the future. *See Carroll*, 916 S.W.2d at 500 (despite absence of agreement with

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warrant, as the TCCA acknowledged that a pending charge is admissible if it is relevant to a theory of the witness's bias or motive for testifying. *See Carmona*, 698 S.W.2d at 104; *Callins*, 780 S.W.2d at 196. Indeed, it acknowledged shortly after petitioner's trial that a pending charge is an appropriate subject for cross-examination under *Carmona* and *Callins*. *Carroll v. State*, 916 S.W.2d 494, 499 (Tex. Crim. App. 1996). Finally, it acknowledged in *Maxwell v. State*, 48 S.W.3d 196, 199 (Tex. Crim. App. 2001), that requiring a defendant to show more than a witness's deferred adjudication status in order to impeach him is inconsistent with *Davis v. Alaska*, 415 U.S. 308 (1974), *Alford v. United States*, 282 U.S. 687 (1931), and *Evans v. State*, 519 S.W.2d 868 (Tex. Crim. App. 1975). These cases were decided long before petitioner's trial.

State, witness still might believe that his testimony would benefit him in future legal problems). An informed jury rationally could have believed that Harris was investing in her future when she contacted the authorities to provide false information that would make her an important witness in a murder case which, if necessary, would give her a credit in the prosecution favor bank.[19]

In *Strickland v. Washington*, this Court addressed the federal constitutional standard to determine whether counsel rendered reasonably effective assistance. The defendant first must show that counsel's performance was deficient; that counsel made errors so serious that he was not functioning as the "counsel" guaranteed the defendant by the Sixth Amendment. The defendant must identify specific acts or omissions of counsel that are alleged not to have been the result of reasonable professional judgment. The reviewing court must then determine whether, in light of all the circumstances, the

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[19] Such a belief would have proven to be correct. Harris, by giving a statement to the authorities and testifying against petitioner, obtained the prosecutor's assistance in having the motion to adjudicate guilt overruled four days after she testified. Although the TCCA observed that her guilt was later adjudicated, and she was sentenced to five years in prison, it failed to mention that this occurred because she committed additional probation violations two years after petitioner's trial, when the State no longer needed her testimony against petitioner.

identified acts or omissions were outside the range of professionally competent assistance.

Lambright testified that he would have impeached Harris had he known about the pending motion to adjudicate guilt and outstanding arrest warrant. The TCCA excused his failure to impeach her with this evidence by creating a scenario in which it would have been reasonable for him not to do so. *Strickland* and *Wiggins* do not authorize a reviewing court to conclude that trial counsel could have made a reasonable strategic decision not to impeach a key prosecution witness with evidence that counsel did not know about – especially when he testifies that, had he known about it, he would have impeached the witness. This Court should grant certiorari because the TCCA decided an important federal question in a way that conflicts with *Strickland* and *Wiggins*. Sup. Ct. R. 10(c).

II. THE TEXAS COURT OF CRIMINAL APPEALS ERRONEOUSLY APPLIED THE PREJUDICE PRONG OF *STRICKLAND V. WASHINGTON* IN HOLDING THAT TRIAL COUNSEL'S FAILURE TO IMPEACH A DIFFERENT KEY PROSECUTION WITNESS DID NOT AFFECT THE OUTCOME OF THE TRIAL.

Longoria persuaded petitioner to enter her car so they could leave and avoid a confrontation with Pacheco. However, Pacheco approached the car with a full quart bottle of beer in each hand and threatened

petitioner. Whether petitioner committed murder, involuntary manslaughter, negligent homicide, or acted in self-defense depended substantially on whether the jury believed that Pacheco raised the beer bottles to hit him. According to Aveilhe and Mueller, Pacheco did not do so. According to petitioner, Longoria, and Payne, he did. Thus, the verdict depended on the credibility of the five eyewitnesses to the shooting and Harris, who testified that petitioner had a gun and expressed a desire to shoot someone on a previous occasion. Her testimony allowed the prosecutor to argue that the shooting was premeditated and that petitioner should receive a life sentence. The jury at the first trial deadlocked in favor of acquittal. The jury at the retrial convicted petitioner of murder and assessed life imprisonment to a high school student with no criminal record.

The testimony of Aveilhe and Harris was crucial to the conviction. Competent counsel would have thoroughly investigated their backgrounds in an effort to discover evidence to impeach their credibility. Lambright failed to discover that they were on felony deferred adjudication probation with pending motions to adjudicate guilt and outstanding arrest warrants and impeach them with evidence that would have demonstrated their bias and motive to testify for the State. Had the jury heard about their pending felony cases, it would have had a much different view of their credibility – especially once it learned that the lawyer representing the Pacheco family in the wrongful death lawsuit was helping them resolve

their cases behind the scenes. It is no surprise that their cases were successfully resolved shortly after petitioner's trial.

Because the TCCA concluded that Lambright did not perform deficiently in failing to impeach Harris, it analyzed prejudice only with regard to his failure to impeach Aveilhe and concluded that there was none. The prejudice analysis was flawed; instead of analyzing whether Lambright's deficient performance undermined confidence in the conviction, as required by *Strickland*, it essentially reviewed whether the evidence was factually sufficient and concluded that, even had he impeached Harris and Aveilhe, the weight of the evidence supported the conviction.[20]

The TCCA initially observed that "the jury was not entirely ignorant of Aveilhe's legal troubles," as he testified that "one reason he did not remain at the scene is that there was an outstanding warrant against him." *App.* 22-23. This characterization of his testimony was grossly understated. The offense report and Aveilhe's written statement to the police indicated that the warrant was for a traffic violation, and he testified before trial in his deposition in the wrongful death lawsuit that he had only been in trouble for traffic tickets (1 H.C.R. 83-91). Neither

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[20] Should this Court conclude that Lambright performed deficiently in failing to impeach Harris, *Strickland* requires that it determine whether the cumulative effect of his failure to impeach both Harris and Aveilhe prejudiced petitioner.

Lambright nor the jury knew the truth – that the warrant was for a probation violation on a second degree felony that would expose him to 20 years in prison – but the State did. A jury aware of Aveilhe's legal predicament would have doubted his credibility because of his powerful motive to help the State convict petitioner.

The TCCA next observed that the circumstances surrounding the shooting, combined with petitioner's flight from the scene, "strongly inculpated" him, and that the defense was not "particularly compelling." *App.* 23. The TCCA did not consider that, despite the flaws in the defense case, the first jury deadlocked (in favor of petitioner, according to Lambright).

The TCCA further observed that the three witnesses who presented "the defense side of the story" – petitioner; his girlfriend, Madelynn Longoria; and his friend, David Payne – "were obviously biased and their testimony was not very credible." *App.* 25. It failed to mention that Harris and her brother had a relationship with the Pacheco family and that Mueller, the witness to the shooting whom it characterized as having "no axe to grind," was a government employee whose testimony differed from his statement to the police.[21] Had Lambright impeached

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[21] Mueller testified that Pacheco did not raise the beer bottles and there was no indication that anyone was angry until the gunshot was fired. Lambright failed to impeach him with his statement to the police that petitioner and Pacheco were arguing at the time of the shooting (1 H.C.R. 80-82). Clearly,

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Aveilhe, Mueller's testimony would have been less compelling. *See Lindsey v. King*, 769 F.2d 1034, 1042 (5th Cir. 1985) ("[O]ur experience . . . has been that positive identification by two unshaken witnesses possesses many times the power of such an identification by one only, and that the destruction by cross-examination of the credibility of one of two crucial witnesses – even if the other remains untouched – may have consequences for the case extending far beyond the discrediting of his own testimony.").

The TCCA's final observation in its prejudice analysis is the most disturbing. "The bottom line is that the State did not need Aveilhe's testimony." *App.* 25. Then why did the State call him, especially considering the heavy baggage he was carrying? The State obviously thought that it needed to call Aveilhe and Harris, even though they were on deferred adjudication probation with motions to adjudicate guilt and outstanding arrest warrants. The "bottom line" is that, if the State thought that Mueller's testimony was enough to convict petitioner, it would not have called Aveilhe and Harris.[22]

Mueller either did not observe all the events or was unwilling to share his observations with the jury.

[22] If the prosecutor thought that Lambright knew about the motions to adjudicate and arrest warrants, and that this evidence was inadmissible, he would have filed a motion in limine to exclude it, citing *Carmona* and *Callins*. If the trial court overruled the motion in limine, he would have elicited this evidence on direct examination to "lessen the sting."

Strickland held that the defendant must show that counsel's deficient performance prejudiced the defense – that counsel's errors were so serious as to deprive the defendant of a fair trial with a reliable result. Ultimately, the defendant must show "a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different. A reasonable probability is a probability sufficient to undermine confidence in the outcome." *Strickland*, 466 U.S. at 694. Petitioner need not show a reasonable probability that, but for Lambright's errors, he would have been acquitted or convicted of a lesser included offense. Rather, the issue is whether he received a fair trial that produced a verdict worthy of confidence. *Cf. Kyles v. Whitely*, 514 U.S. 419, 434 (1995).

The jury did not know that the State was protecting two felons who were fugitives from justice at the time of petitioner's trial. Lambright failed to pierce this veil of deceit and expose their bias and motive for testifying. As a result, petitioner was denied the effective assistance of counsel and a fair trial. The TCCA erroneously applied the prejudice prong of *Strickland*. This Court should grant certiorari because the Court of Criminal Appeals decided an important federal question in a way that conflicts with *Strickland*. Sup. Ct. R. 10(c).

CONCLUSION

Petitioner requests that this Court grant the petition for a writ of certiorari and summarily reverse the judgment of the TCCA or, in the alternative, order briefing and oral argument.

Respectfully submitted,

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2009 WL 4931883 (Tex.Crim.App.)

Court of Criminal Appeals of Texas.
Ex Parte Carlos Luis CAMPOS, Applicant.
No. AP-76,118.

Dec. 16, 2009.
Rehearing Denied Feb. 3, 2010.

On Application for a Writ of Habeas Corpus from Harris County.

KELLER, P.J. delivered the opinion of the court in which MEYERS, WOMACK, KEASLER, HERVEY, HOLCOMB and COCHRAN, JJ., joined.

We filed and set this application to determine whether trial counsel rendered ineffective assistance in failing to impeach two of the State's witnesses for bias and motive. We conclude that applicant has failed to satisfy the *Strickland*[1] test, and we therefore deny relief.

I. BACKGROUND

A. Procedural History

Applicant was indicted for murdering Alexander Pacheco on June 2, 1994. He was tried in January of 1995, but that trial ended in a mistrial because the jury was unable to reach a verdict. According to trial counsel's affidavit, "a slim majority of the jurors

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[1] *Strickland v. Washington*, 466 U.S. 668, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984).

favored acquittal on the basis of self-defense."[2] Applicant was retried in June of 1995. At the second trial, the jury found him guilty, sentenced him to life in prison, and made an affirmative deadly weapon finding. The Fourteenth Court of Appeals affirmed his conviction.[3]

Applicant subsequently filed this application for habeas corpus. Among other things, the application alleges that two of the State's witnesses at the second trial – Sean Aveilhe and Lynn Harris – were on felony deferred adjudication, with motions to adjudicate pending, and: (1) the State violated *Brady v. Maryland*[4] by failing to reveal this information, or (2) defense counsel was ineffective in failing to impeach the witnesses with this information at the second trial. We remanded the case to the trial court for further proceedings, including obtaining an affidavit and making findings regarding applicant's *Brady* claim. The trial court complied with our remand order, and a supplemental record has been forwarded to us. In its supplemental findings, the trial court found that information with respect to Aveilhe and Harris was disclosed by the State to defense counsel.[5]

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[2] The trial court made no finding of fact regarding the credibility of this statement.

[3] *Campos v. State,* No. 14-95-00740-CR (Tex.App.-Houston [14th Dist.] June 5, 1997) (not designated for publication).

[4] 373 U.S. 83, 83 S.Ct. 1194, 10 L.Ed.2d 215 (1963).

[5] The trial court's findings are supported by the following evidence: Affidavits from Carolyn Allen, the prosecutor at

(Continued on following page)

We ordered briefing on the ineffective assistance question.[6]

B. Evidence – The Underlying Events

1. Inside the Store

A recitation of the facts is necessary. On June 2, 1994, applicant shot and killed Alexander Pacheco outside a Stop-N-Go store. Certain events that occurred inside the store were recorded on videotape by a store camera, but the sound quality is poor. The State used transcripts at trial,[7] and the defendant contested the accuracy of those transcripts before the

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applicant's first trial, and Matthew Alford, the prosecutor at applicant's second trial, stated that the information concerning Aveilhe was in the State's file. In addition, though she had no specific recollection of her actions, Allen believed, based upon a motion in limine she drafted regarding Aveilhe's record, that she provided the information to defense counsel. In his supplemental affidavit, Alford stated that, though he had no specific memory of Harris, or her criminal history, he would have talked to Harris prior to trial. In her affidavit, Harris stated that she discussed her outstanding warrant with Alford. Further, though Alford had no specific recollection of whether he discussed the criminal histories of Aveilhe and Harris with defense counsel, he said that his normal practice would have been to divulge information concerning the criminal histories of the State's witnesses.

[6] *Ex parte Campos*, No. AP-76,118 (Tex.Crim.App. March 18, 2009) (not designated for publication).

[7] The jury was allowed to use the transcripts as an aid while the tape was played at trial, but the transcripts were not admitted into evidence and were not available during deliberations.

jury. An enhanced version of the videotape and a different set of transcripts that were available during a civil trial have been made part of the record of this habeas proceeding.

In rough outline, the following sequence of events can be gleaned from a review of the videotapes and of testimony concerning the events depicted: At around midnight, applicant entered a Stop-N-Go with his girlfriend, Madelyn Longoria. He began talking to the store clerk, David Michael Payne, who was a good friend of his. Alexander Pacheco entered the store, drinking from a Rolling Rock bottle, to buy some beer. When he placed two quart bottles of beer on the counter, Payne asked for his identification. Applicant commented that Pacheco did not look like he was twenty-one. Pacheco responded, "Who asked you?" Applicant replied, "Your daddy." Pacheco responded, "That shows what you know. I don't have a daddy." Applicant replied, "I'll show you how much I know," and left the store. Longoria soon followed, placing her drink on the counter before leaving the building.[8] As Pacheco paid for the beer, he asked Payne whether applicant carried a gun. Payne replied that he did not know, and asked, "Why?"

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[8] Applicant and Longoria were each holding a paper soft drink cup while standing in line to pay for the drinks. However, applicant left the store with his cup in hand, and Longoria left the store without paying for either of the drinks.

Both the original and enhanced tapes are difficult to understand after this point. The State's transcript shows Pacheco responding, "I don't know, wondering about what he went to get." Applicant contends that the civil trial transcript more accurately depicts the conversation, with Pacheco responding, "I don't know, that's probably what he went out to get. I will fuck him up."[9] Payne later testified that he did not pay attention to Pacheco's answer to his question and could not relate what was said. As Pacheco left the store, Payne walked to the door to wave to Rodney Mueller, a customer waiting to pump gasoline.

2. Outside the Store

Though accounts differ as to what happened next, the witnesses agree that applicant and Longoria got into a car with applicant on the passenger side, that Pacheco approached the car, that Pacheco was shot in the face by a gun that applicant was holding, that applicant told Longoria that they needed to leave, and that the car backed into Mueller's car and then sped away. The undisputed evidence also shows that applicant and Longoria did not call the police and that Longoria drove to a neighborhood where applicant threw the gun into some bushes.

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[9] At trial, defense counsel argued to the jury that the videotape showed Pacheco saying "I'll fuck him."

a. *Mueller's Account*

Mueller was at the Stop-N-Go to buy gasoline. He did not know any of the people at the store that night. He saw what he believed to be five hispanic males leave the store, but he would later learn that one of those individuals – Longoria – was a female. Mueller said that he "really wasn't paying a lot of attention until the shooting" but "after the shooting [he] started paying a lot more attention to what was going on around [him]." Later in his testimony, though, Mueller said that he was "paying attention" before the shooting because he was at a gas station at night and was "a little bit leery."

Mueller saw applicant and Longoria get into their car and then saw Pacheco walk over to the car. "As soon as he did, [applicant] pulled out a handgun and shot him." Mueller testified that he actually saw a gun come out of the passenger side window. After the shot, Mueller heard the crash of a beer bottle. When asked whether he saw Pacheco carrying the bottles before the shooting, Mueller indicated that Pacheco had been carrying two bottles in his right hand. When asked whether he saw Pacheco raise up the bottles at any point, Mueller replied "no." On cross-examination, Mueller testified that Pacheco's right hand was blocked from view at the actual time of the shooting, but he had seen the bottles as Pacheco approached Longoria's car.

After the shooting, Mueller crouched behind a gas pump and then ran to the side of the store. He

looked over to see if applicant was going to shoot anyone else, and he saw a "smile" or "grin" on applicant's face.

b. *Aveilhe's Account*

Sean Aveilhe drove with a friend to the Stop-N-Go to buy beer. Aveilhe stayed in the car while the friend went into the store. Aveilhe saw applicant talk to the friend before applicant entered the store. Aveilhe had seen applicant before but did not know who he was. Later, Aveilhe noticed that Pacheco was in the store at the counter. Pacheco was an acquaintance, but Aveilhe did not know him very well. Aveilhe saw Pacheco walk out of the store, throw something into a trash can, and then walk toward the gas pumps. Pacheco was carrying two beer bottles at waist height. When asked whether Pacheco ever raised the bottles, Aveilhe replied, "no." As he was walking toward his own car, Pacheco made a ninety-degree turn and started walking toward Longoria's car.

When Pacheco arrived at Longoria's car, Aveilhe heard him ask applicant if he was "talking shit" to him. Applicant answered affirmatively, and then Aveilhe heard a gunshot. Aveilhe ducked down in his car, then heard a crash, as Longoria's car backed into Mueller's car. Aveilhe saw applicant motion with his hands and say, "Go, baby, go!" Longoria then drove away.

When Aveilhe's friend came out of the store, they left immediately. Aveilhe gave three reasons for

leaving the scene: (1) his friend wanted to leave, (2) there was a warrant out for Aveilhe's arrest, so he did not want to be there when the police arrived, and (3) Aveilhe was afraid applicant would realize that there were witnesses to the shooting. After fleeing the scene, Aveilhe used a pay phone to call the sheriff's office.

c. *Payne's Account*

According to Payne,[10] Pacheco stopped by a trash can to throw away the Rolling Rock bottle after he left the store. He then grabbed the two beer bottles by their necks and advanced on Longoria's car. As Pacheco reached the car, he raised the bottles up over his head as if he were planning to smash them down on applicant. Then Payne heard a gunshot, and Pacheco fell to the ground. During later questioning, Payne acknowledged that he had testified at the previous trial that Pacheco confronted applicant with his hands out to his side, a gesture he had interpreted as meaning "if you want to fight, come on and get me."

When asked whether he watched applicant shoot Pacheco, Payne replied that he "couldn't see that far away." In a prior deposition, however, Payne had answered "yes" to whether he saw applicant shoot Pacheco. Payne said that he was near-sighted and

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[10] Though much of his testimony was friendly toward the defense, Payne was called by the State in its case-in-chief.

was not wearing his glasses on the night of the shooting because they were broken. When asked how far away he was from Pacheco at the time of the shooting, Payne first answered, "I don't know." When pressed for an estimate, he replied, "Maybe three feet." Later he changed his answer to "five feet" and when asked to estimate what was five feet, he replied that it was the distance from the witness stand to the windows in the courtroom. When asked how he could see Pacheco's actions but not applicant's, Payne replied, "Because there was the light from the store on the bottles."

Payne had known applicant for five years, and they often played basketball together. Payne initially lied to the police about whether he knew applicant when confronted with applicant's image on the store videotape, and he pretended to be unable to pick applicant's picture out of a high school yearbook. Payne later acknowledged that he deceived the police in an attempt to protect his friend.

Payne also testified that applicant had shown him a gun two months before at the neighborhood park where they played basketball. When asked whether the gun applicant had shown him looked like one of the State's exhibits, Payne replied, "I don't know. I couldn't see. I told you, I was blind. My vision was blurry." After a recess, the prosecutor asked Payne again whether the gun applicant showed him looked like one of the State's exhibits, and Payne answered that it "might have been." Payne also admitted that the conversation he had with applicant

on the night Pacheco was shot included talk about shooting a gun.

d. *Longoria's Account*

Longoria was applicant's girlfriend at the time of the incident and at the time of trial. She testified that Pacheco placed the two beer bottles he had bought on top of a trash can after he left the store. She then saw him grab one of the bottles by the neck and turn it "up in an upward motion." She thought he had taken the top of a bottle off and thrown it away. On cross-examination she said that he took the top off of one of the bottles and carried it upright while holding the other bottle by its neck. On further cross-examination, she admitted that, at the previous trial, she testified that Pacheco carried both bottles by the neck. After picking up the bottles, Pacheco then mumbled something to the effect of "you want some shit" and walked straight from the trash can to her car.

Longoria claimed that applicant was saying, "Let's go," but she panicked and was having trouble starting her car. She testified that there was an alarm system that prevented the car from starting if the headlights were not turned on. She also testified that the passenger window was down and was "kind of like off track" and difficult to roll up. She claimed that rolling up the window took two hands from a standing position and that it "takes awhile."

Longoria further testified that she did not realize that applicant had retrieved a gun until right before the shot went off and that she had not realized until then that a gun was in her car. The day before the shooting, applicant had directed her to a road with a grassy median, and he searched the median and found a gun there. In the six months that she had been dating applicant, she had never seen him with a gun. Applicant told her that he was retrieving the gun for a friend. She believed that he had taken the gun out of the car with some of his clothes.

Longoria also testified about applicant hiding the gun. And she testified that, holding a flashlight and using a pitcher of water, she washed off the rear bumper of her car after returning home. She claimed that she did so to see more clearly if there was major damage to the car rather than to try "to wash off any damage" that was incurred.

e. *Applicant's Account*

Applicant testified that Payne's stepbrother Billy had been forced to abandon a gun at a party because the police had arrived. Two days before the shooting, Billy said that he had thrown the gun onto the median of a road. Though applicant did not know the exact location of the gun, he was able to retrieve it, and he left it overnight in Longoria's car. Applicant claimed that he was unfamiliar with this type of weapon and had never fired one. He took the clip out and ascertained that it did not contain any

ammunition. He then went to his garage to see if some bullets he had found would fit. He claimed that he had found some bullets in a fishing box by a place called the Cliffs. Discovering that the bullets did indeed fit, applicant loaded the clip, went back to Longoria's car, and placed the clip in the glove compartment. The gun itself remained underneath the front passenger seat. When applicant was at the store on the night of the shooting, he talked to Payne about shooting the gun sometime.

Applicant testified that, when he walked out of the store, he was ready to "bump chests and kiss lips," by which he meant a verbal confrontation where he and Pacheco would "get in each other's faces." This could lead to "hitting each other" if they kept "talking back to each other rudely." But Pacheco did not leave the store right away, so applicant cooled down and decided to get in Longoria's car.

Once he was in the car, applicant saw Pacheco leave the store and walk to a garbage can. Pacheco then started making "smart-aleck" statements to applicant, picked both beer bottles up by their necks, and, holding the bottles at shoulder or head height, walked towards Longoria's car. While Pacheco was advancing on the car, applicant told Longoria a couple of times, "Get the car started! Come on, let's go, let's get out of here!" Applicant also reached into the glove compartment to grab the clip and reached underneath his seat to grab the gun. Applicant inserted the clip into the gun, began pulling the slide back, and held the gun up to the window. Then the gun jerked

forward and went off. Though applicant had his finger on the trigger, he testified that he did not mean to shoot it. Applicant claimed he was in fear for his life at the time he retrieved the gun because Pacheco could have smashed him on the head with the beer bottles. The prosecutor had applicant demonstrate for the jury his actions of retrieving the gun and the clip and putting them together.

According to applicant, when the shot went off, he said "My God, he's shot!" and then said something like, "What should I do?" and, "Let's go," and, "Go, baby." Applicant further testified that he directed Longoria to a neighborhood that he was not very familiar with and that he threw the gun into some bushes. He threw the gun away because he "just didn't want the gun anymore."

3. *Before the Incident – Lynn Harris & Jean Dugas*

Lynn Harris did not testify at the first trial but testified at the second trial. Jean Dugas testified at the first trial but did not testify at the second trial, though he was under subpoena.

At the second trial, Harris testified that, on May 27, 1994, she attended a high school graduation party, where she saw applicant. During the party, applicant grabbed Jean Dugas's hand and placed it on applicant's stomach, while saying, "I don't have to worry about nothing. We don't have to worry about nothing. I am just waiting for someone to talk shit to

me." Later, when the police arrived at the party, applicant stated, "What am I going to do? What am I going to do? I got this gat." Harris explained that "gat" was a slang term for a gun. As applicant was talking, his shirt came up, and Harris saw the black handle of a gun.

Harris also made a statement to the police about the incident on June 3, 1994. In that statement she said:

> Carlos placed the palm of John's[11] hand on his stomach so that John could feel something he had under his shirt. The shirt wasn't tucked in. Carlos told John, "I'm not worried about nothing. I'm waiting for someone to say something so that I can shoot them." Carlos walked away with his girlfriend.
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> Later on that night the police came and broke up the party. As we were getting ready to leave Carlos walked up to us and pulled up his shirt several times. I saw that he had a gun under his shirt. He was very nervous. He was talking with Thomas Mc Swain. He was trying to decide whether or not to leave. He was afraid the police were going to find his gun.

At the first trial, Dugas testified about the same incident. He said that at a party in May 1994,

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[11] "John" is Jean Dugas.

applicant grabbed Dugas's hand and placed it on a gun tucked in applicant's waistband, while saying that if anyone started to mess with him, he'd shoot them.

C. The Impeachment Information

On March 28, 1991, Aveilhe was placed on deferred adjudication for possession of LSD with intent to deliver. In May of 1992, the State filed a motion to adjudicate guilt, and a capias for Aveilhe's arrest was issued. Aveilhe was adjudicated guilty on October 6, 1995 and sentenced to five years in prison, but he was granted shock probation on December 1, 1995.

On March 2, 1994, Harris was placed on deferred adjudication for burglary of a habitation. Between applicant's first and second trials, Harris moved to North Carolina, in violation of her conditions of supervision, because her father was ill. On February 21, 1995, the State filed a motion to adjudicate guilt. The motion to adjudicate was overruled by agreement on May 13, 1996, but her guilt was later adjudicated, and she was sentenced to five years in prison.

II. ANALYSIS

An applicant must show two things to establish ineffective assistance of counsel under *Strickland*: (1)

deficient performance by counsel and (2) prejudice.[12] To establish deficient performance, the defendant must show "that counsel's representation fell below an objective standard of reasonableness."[13] To establish prejudice, the defendant must show "that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different."[14] "A reasonable probability is a probability sufficient to undermine confidence in the outcome."[15]

A. Deficient Performance

We turn first to the question of deficient performance. We measure counsel's performance "against the state of the law in effect during the time of trial."[16] Counsel is not held responsible for later judicial decisions that change the law, nor can he be found ineffective if the law was unsettled at the time counsel acted on the defendant's behalf.[17] In assessing defense counsel's performance in the present case, we find it helpful to trace the development of the law with respect to the type of impeachment claims at issue here.

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[12] 466 U.S. at 687.

[13] *Id.* at 688.

[14] *Id.* at 694.

[15] *Id.*

[16] *Ex parte Roemer,* 215 S.W.3d 887, 894 (Tex.Crim.App.2007).

[17] *Id.*

In *Davis v. Alaska,* the Supreme Court of the United States held that the Confrontation Clause of the Sixth Amendment[18] required that the defendant be permitted to impeach a witness with evidence that showed that the witness had a vulnerable relationship with the State.[19] In *Davis,* a bar was burglarized, and the safe was taken.[20] The safe was ultimately recovered near the house of one of the State's witnesses.[21] This witness identified the defendant as carrying a crowbar and standing beside a car in the location where the safe was later found.[22] The defendant was not allowed to present evidence that this witness was on probation for juvenile delinquency for burglaries of his own.[23] In holding that the trial court erred in excluding the evidence, the Supreme Court observed:

The accuracy and truthfulness of [the witness's] testimony were key elements in the State's case against [the defendant]. The claim of bias which the defense sought to develop was admissible to afford a basis for an inference of undue pressure because of [the witness's] vulnerable status as a probationer, as

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[18] "In all criminal prosecutions, the accused shall enjoy the right . . . to be confronted with the witnesses against him." U.S. CONST., Amend. 6.

[19] 415 U.S. 308, 94 S.Ct. 1105, 39 L.Ed.2d 347 (1974).

[20] *Id.* at 310.

[21] *Id.*

[22] *Id.*

[23] *Id.* at 310-11.

well as of [the witness's] possible concern that he might be a suspect in the investigation.[24]

Although a number of Texas cases have addressed the holding in *Davis,* we discuss several that represent the evolution of *Davis's* progeny in this state. In *Evans v. State,* the prosecution witness was under indictment for an unrelated offense, but he was a potential suspect in the offense for which the defendant was charged, and the accuracy of the witness's testimony was crucial to the State's case.[25] We held that the trial court erred, under *Davis,* in refusing to permit impeachment based on the pending criminal charge.[26] In *Randle v. State,* the prosecution witness was under indictment for an unrelated offense but was *not* a potential suspect for the offense for which the defendant was charged.[27] Nevertheless, we held that the witness's pending charge "was admissible to afford a basis for an inference of undue pressure due to his status as an indictee."[28]

However, in *Carmona v. State,* we held that "the principle of *Davis v. Alaska* is not offended when a defendant is prohibited from asking a witness about an unrelated pending charge, provided that the

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[24] *Id.* at 317-18 (citation and footnote omitted, bracketed material substituted for original).

[25] 519 S.W.2d 868, 871-73 (Tex.Crim.App.1975).

[26] *Id.* at 873.

[27] 565 S.W.2d 927, 929-30 (Tex.Crim.App.1978).

[28] *Id.* at 931.

defendant has otherwise been afforded a thorough and effective cross-examination and where . . . the bias and prejudice of the witness is . . . patently obvious."[29] And in *Callins v. State,* we held that the rule in *Davis* was not violated by the refusal to permit the defendant to impeach a witness with his status of being on deferred adjudication, where the defendant made no showing that the witness's testimony was "a result of bias, motive or ill will emanating from his status of deferred adjudication."[30]

In two later cases, decided after applicant's trial, this Court backed away from the holdings in *Carmona* and *Callins.* In *Carroll v. State,* this Court held that the Confrontation Clause requires that a defendant always be permitted to impeach a witness with the existence of a pending criminal charge.[31] Judge Keller dissented, contending that prior precedent did not require admission of pending charges in every case.[32] "[O]rdinarily, the mere existence of a pending charge gives rise to an inference that the witness may have been influenced," she said, "But in some cases, additional facts in the record may show that such an inference is not warranted."[33]

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[29] 698 S.W.2d 100, 104 (Tex.Crim.App.1985).

[30] 780 S.W.2d 176, 196 (Tex.Crim.App.1989); *see also Jones v. State,* 843 S.W.2d 487, 496 (Tex.Crim.App.1992) (citing *Callins*).

[31] 916 S.W.2d 494, 497-98, 501 (Tex.Crim.App.1996).

[32] *Id.* at 505, 505 n. 2 (Keller, J. dissenting) (citing *Carmona*).

[33] *Id.* at 505.

Concluding that *Carroll* was such a case, Judge Keller observed that the witness was charged with aggravated robbery *after* he gave the police a statement regarding the offense with which the defendant was charged, and the witness's earlier statement was entirely consistent with his later testimony.[34] In *Maxwell v. State,* the Court disavowed the rule in *Callins* that something must be shown beyond the witness's deferred adjudication status before impeachment must be allowed under the Confrontation Clause.[35]

Applicant was tried after *Carmona* and *Callins* but before *Carroll* and *Maxwell.* Under *Callins,* in order to be entitled to impeach Aveilhe and Harris, applicant had to show more than that they had pending deferred adjudications. Applicant did so: Not only did the witnesses have pending deferred adjudications, but they also had pending motions to adjudicate.

The existence of motions to adjudicate is significant. It could be argued that a person may believe that he has nothing to worry about if deferred adjudication supervision is being served in a satisfactory manner. Such a person may believe that if he just continues to meet the conditions of supervision, then there is nothing that the State can or will do to him. But if a motion to adjudicate is pending, then

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[34] *Id.* (emphasis in original).

[35] 48 S.W.3d 196, 198-200 (Tex.Crim.App.2001).

the person does have something to worry about. Such a person is in essentially the same position as a person with pending charges. His fate is no longer in his own hands, and the possibility of currying favor becomes more evident. The pre-*Carroll* caselaw at least suggested that pending charges were generally enough to raise an inference that the witness's testimony flowed from a vulnerable relationship, for which the witness could be impeached, though under that caselaw there was still the possibility that additional circumstances could negate such an inference.

With respect to Harris, there were additional circumstances that might negate such an inference. Although Harris was on deferred adjudication, no motion to adjudicate was pending when she gave her statement to the police. In fact, the conduct that would later become the basis for the State's motion had not yet occurred. Harris's testimony at applicant's second trial was consistent with, and no more incriminating than, her earlier statement. Under pre-*Carroll* caselaw, then, a defense attorney could have reasonably believed that Harris's trial testimony was not influenced by the vulnerable relationship she had with the State because that relationship arose after her earlier statement to the police. Even if defense counsel were unaware of Harris's pending motion to adjudicate at the time of applicant's trial, defense counsel's failure to discover the motion to adjudicate would not constitute deficient performance because it would have been reasonable to assume that Harris's statement to the police fixed the relevant point in

time for determining any influences bearing upon her credibility.

The same cannot be said with respect to Aveilhe. The State had filed its motion to adjudicate over two years before the shooting at issue here. Though Aveilhe was never a suspect in this case, during all stages of the investigation and prosecution, he was subject to having his offense adjudicated. He no longer had the assurance that he could retain his liberty if he followed the conditions of his supervision. He had an obvious incentive, even under the caselaw prior to *Carroll* and *Maxwell,* to curry favor with the State in an effort to derail the proceedings against him. Trial counsel does not claim in the habeas proceedings to have had a trial strategy for failing to impeach Aveilhe with the information relating to his deferred adjudication and the motion to adjudicate; counsel claims that he was unaware of the evidence because the State had not disclosed it. We did not file and set on the issue of appellant's *Brady* claims and we need not say much here except to observe that the record supports the trial court's findings that the information was disclosed to defense counsel. Consequently, we conclude that counsel was deficient in failing to impeach Aveilhe with this information.

B. Prejudice

We next move to the question of prejudice. We first observe that the jury was not entirely ignorant of Aveilhe's legal troubles. Aveilhe himself testified that

one reason he did not remain at the scene was that there was an outstanding warrant against him.

Much more significant was the other evidence against applicant. It was undisputed that applicant shot Pacheco. The only question was whether the shooting was a murder, an accident, or self-defense. No one testified that Pacheco had anything that could be used as a weapon other than a couple of beer bottles. Applicant and his girlfriend were inside their car when Pacheco approached them. Had they driven away at that point, Pacheco would have posed no threat to them. Or applicant could have rolled up his window to keep himself out of Pacheco's reach. Instead, he shot Pacheco, and afterwards fled the scene with his girlfriend.[36] During their flight, they hid the murder weapon. And they never called the police. This sequence of events, by itself, strongly inculpated applicant, and the defense's exculpatory explanations were not particularly compelling.

For instance, Longoria claimed that the car would not start because she panicked and was having difficulty with the unusual alarm system in the car. Her testimony, though, was that the alarm system prevented the car from starting if the headlights were not turned on. Even if true, all she had to do was turn on the lights.

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[36] Flight is evidence of guilt. *Clayton v. State*, 235 S.W.3d 772, 780 (Tex.Crim.App.2007).

Another explanation that was too convenient was the claim that applicant retrieved the gun for a friend the day before, and that gun – a Beretta – just happened to be compatible with some ammunition – hollow point bullets – that he had previously happened to find in a fishing box. Despite his friend's vague description, applicant was able to locate the gun fairly quickly, and despite the fact that it was not his gun, applicant decided to see if the bullets he had found were compatible with it.

Other evidence refuted the claim that applicant came into possession of a gun only the day before and tended to rebut any claim that he was unfamiliar with this type of gun or guns in general. Payne admitted that he had seen applicant with what could have been a similar gun two months before the shooting. Harris testified that she saw applicant with a gun at a party less than a week before the shooting. Harris also testified to applicant's eagerness to use the gun, as he was "just waiting for someone to talk shit" to him.[37]

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[37] We consider the full impact of Harris's testimony in our prejudice analysis because of our prior conclusion in this opinion that counsel did not perform deficiently in failing to impeach her. However, even if Harris had been impeached, the State would have then been able to admit her prior statement to the police as a prior consistent statement to rebut a charge of recent fabrication or improper influence or motive. *See* TEX.R. EVID. 801(e)(B). In addition, the State could have decided to introduce Dugas's testimony, which would have confirmed applicant's

(Continued on following page)

The three witnesses that presented the defense side of the story – Payne, Longoria, and applicant – were obviously biased and their testimony was not very credible. Applicant's interest in the case is obvious, and Longoria was his girlfriend. Longoria also tried to cover up the events of the evening of the shooting by washing the area of her car that had collided with Mueller's car. Payne was a friend applicant had known for five years and played basketball with. Payne tried to cover for applicant by pretending to be unable to identify him to the police. And the credibility of Payne's description of events is undermined by the fact that he was nearsighted and was not wearing glasses. Payne also had difficulty estimating how far away Pacheco was from applicant at the time of the shooting.

The bottom line is that the State did not need Aveilhe's testimony. The undisputed evidence regarding the events of the evening was highly incriminating and the witnesses testifying in applicant's favor were obviously biased. The only really incriminating evidence that Aveilhe testified to that was not admitted to by applicant was that Pacheco was holding the beer bottles in a non-threatening manner. But testimony to that effect was given by another eyewitness, Mueller, who was not in a vulnerable relationship with the State and had no axe to grind.

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possession of a gun and, if not his eagerness, then at least his willingness to use it.

Further, the State was able to impeach both Payne and Longoria on this subject with inconsistent testimony from the previous trial. And even if Aveilhe had been impeached, his testimony would still have been before the jury. Given the highly incriminating circumstances, and Mueller's direct testimony, impeaching Aveilhe with his vulnerable relationship with the State would not likely have led the jury to disbelieve Aveilhe's testimony, much less affect the outcome of the case.

C. Conclusion

We conclude that applicant has failed to meet the deficient performance prong of *Strickland* with respect to Harris's testimony and has failed to meet the prejudice prong with respect to Aveilhe's testimony. Consequently, we deny relief.

PRICE, and JOHNSON, JJ., concurred.

NO. 0413877-A

EX PARTE	§	IN THE 179TH DISTRICT
	§	COURT
CARLOS LUIS CAMPOS,	§	
Applicant	§	OF
	§	
	§	HARRIS COUNTY, TEXAS

FINDINGS OF FACT, CONCLUSIONS OF LAW AND ORDER

(Filed Nov. 10, 2008)

The Court, pursuant to the Court of Criminal Appeals' May 14, 2008 order on remand, and having considered the applicant's application for writ of habeas corpus, brief, affidavits and exhibits; the Respondent's Original and Amended Answers, affidavits, and exhibits; the official court documents and records in cause numbers 9412877 and 9412877-A; and, the court's personal recollection of the trial proceedings in the instant cause, makes the following supplemental findings of fact and conclusions of law:

FINDINGS OF FACT

1. On July 16 2007, this Court entered findings of fact and conclusions of law recommending the denial of post-conviction habeas relief in cause no. 9412877-A.

2. On May 14, 2008, the Court of Criminal Appeals ordered that Matthew Afford submit a second affidavit responding to the applicant's *Brady* allegations. Additionally, the Court ordered that the trial court enter

supplemental findings on the following: (1) whether the State failed to disclose evidence and, if so, whether the evidence was favorable and material; and (2) whether the applicant was prejudiced by defense counsel's failure to impeach State's witness Rodney Mueller.

3. The Court finds credible the affidavits of Carolyn "Kari" Sckerl Allen and Matthew Afford. *See affidavits of Carolyn "Kari" Sckerl Allen and Matthew Alford.*

4. The Court finds that the applicant was convicted for the instant offense in November, 1995; that the Court of Appeals affirmed the conviction in June, 1997; and, that the applicant filed the instant post-conviction habeas application in June, 2005.

SUPPLEMENTAL OFFENSE REPORT

5. The Court finds, based on the affidavit assertions of Carolyn "Kari" Sckerl Allen and Matthew Alford, that Deputy Gonzales' June 2, 1994 supplemental offense report, including the summary of Gonzales' telephone conversation with Rodney Mueller where Mueller stated that "he overheard Mr. Pacheco and suspect #1 [Campos] arguing," was in the State's file and available for defense counsel to review prior to trial.

6. The Court finds that the State disclosed Deputy Gonzales' June 2, 1994 supplemental offense report to defense counsel prior to trial based on the following: that the State's file, which included the police offense

report and Deputy Gonzales' supplemental offense report, was open and available for trial counsel to review prior to trial; that Deputy Gonzales used his offense report to refresh his memory during the initial trial and the retrial of the instant cause; and, that the prosecutor tendered a copy of Gonzales' offense report to defense counsel during the initial trial.

7. The Court further finds that the information contained in Deputy Gonzales' June 2, 1994 supplemental offense report summarizing his telephone conversation with Rodney Mueller was not favorable to the defensive strategy to demonstrate that the complainant got upset in the convenience store and had an attitude as a tough guy; that the applicant retreated from the confrontation with the complainant; that the complainant was the aggressor and approached the applicant, holding beer bottles like weapons; that the applicant thought that the complainant intended to hit him with the beer bottles and pulled his gun because he feared for his life; and, that the applicant did not intend to shoot the complainant.

8. The Court finds that, because the information contained in Deputy Gonzales' June 2, 1994 supplemental offense report summarizing his telephone conversation with Rodney Mueller was not favorable to the defense, the applicant was not prejudiced by trial counsel's failure to impeach Rodney Mueller with such information.

9. The Court finds that the jury heard testimony describing the exchange between the applicant and the complainant, similar to the information contained in Gonzales' supplemental report, when Sean Aveilhe testified at guilt-innocence that there appeared to be some kind of dispute between the applicant and the complainant (IV R.R. at 176).

10. The Court finds that disclosure of Deputy Gonzales' supplemental offense report would not have changed the outcome of the instant trial in light of the strength of the State's evidence against the applicant and given that the jury heard similar testimony from State's witness Sean Aveilhe at guilt-innocence; accordingly, the Court finds that such evidence was not material.

SEAN AVEILHE'S CRIMINAL HISTORY

11. The Court finds, based on the affidavit assertions of Carolyn "Kari" Sckerl Allen and Matthew Alford, that information concerning Sean Aveilhe's criminal history was in the State's file and available for defense counsel to review prior to trial in the instant case.

12. The Court finds that the State disclosed Sean Aveilhe's criminal history to the defense prior to the instant trial based on the affidavit assertion of Carolyn "Kari" Sckerl Allen that she provided the information concerning Aveilhe's criminal history to defense counsel prior to trial and the affidavit assertions of Matthew Alford that his normal practice

was to divulge information concerning the criminal histories of State's witnesses to defense counsel.

13. The Court finds that Sean Aveilhe testified for the State at guilt-innocence that the complainant did not raise the beer bottles higher than waist level (IV R.R. at 36; V R.R. at 19-23, 133-4).

14. The Court finds that State's witness Rodney Mueller testified similarly to Sean Aveilhe at guilt-innocence, stating that he never saw the complainant raise the beer bottles as he approached the applicant (III R.R. at 83).

15. The Court finds that disclosure of the criminal history of Sean Aveilhe would not have changed the outcome of the instant trial in light of the strength of the State's case against the applicant and given that the jury heard similar testimony from State's witness Rodney Mueller at guilt-innocence; accordingly, the Court finds that such evidence was not material.

LYNN HARRIS' CRIMINAL HISTORY

16. The Court finds that the State disclosed the criminal history of the State's rebuttal witness Lynn Harris to the defense prior to trial in the instant cause based on the affidavit assertions of Matthew Alford that it was his normal practice to disclose to the defense information concerning the criminal histories of State's witnesses.

17. The Court finds that the testimony of State's rebuttal witness Lynn Harris did not concern the

facts surrounding the instant offense or the applicant's culpability for the instant offense; rather, Harris testified regarding the applicant's behavior at a party held the month before the instant offense (V R.R. at 156-9, 200-7).

18. The Court finds that disclosure of Lynn Harris' criminal history would not have changed the outcome of the instant trial based on the strength of the State's case against the applicant and given that Harris' rebuttal testimony did not concern the facts of the instant offense; accordingly, the Court finds that such evidence was not material.

CONCLUSIONS OF LAW

1. Based on the State's disclosure of potential impeachment evidence concerning State's witnesses Rodney Mueller, Sean Aveilhe, and Lynn Harris, the applicant's allegations urging violations of *Brady v. Maryland*, 373 U.S. 83 (1963), are meritless.

2. Alternatively, because the alleged impeachment evidence contained in Sgt. Gonzales' supplemental offense report was inconsistent with the defense's trial strategy and not favorable to the defense, the applicant's allegation of a *Brady* violation is meritless. *United States v. Bagley*, 473 U.S. 667, 682 (1985); *Thomas v. State*, 841 S.W.2d 399, 404 (Tex. Crim. App. 1992).

3. Additionally, because the alleged impeachment evidence concerning Sean Aveilhe and Lynn Harris

was not material, the applicant's allegations urging *Brady* violations are meritless. *Webb v. State*, 232 S.W.3d 109, 114 (Tex. Crim. App. 2007) (mere possibility that an item of undisclosed information might have helped the defense, or might have affected the outcome of the trial, does not establish materiality in the constitutional sense).

4. Additionally, because the alleged impeachment evidence contained in Sgt. Gonzales' supplemental offense report was inconsistent with the defense's trial strategy and not favorable to the defense, defense counsel was not ineffective for failing to impeach Rodney Mueller with such information. *Strickland v. Washington*, 466 U.S. 668, 686 (1984).

5. Accordingly, it is recommended to the Texas Court of Criminal Appeals that relief be denied.

NO. 0413877-A

EX PARTE	§	IN THE 179TH DISTRICT
CARLOS LUIS CAMPOS,	§	COURT
Applicant	§	OF
	§	
	§	HARRIS COUNTY,
	§	TEXAS

ORDER

THE CLERK IS HEREBY **ORDERED** to prepare a transcript of all papers in cause no, 9412877-A and transmit same to the Court of Criminal Appeals, as provided by Article 11.07 of the Texas Code of Criminal Procedure. The transcript shall include certified copies of the following documents:

1. all of the applicant's pleadings filed in cause number 9412877-A, including his application for writ of habeas corpus, brief, affidavits, and exhibits, unless they have been previously forwarded to the Court of Criminal Appeals.

2. all of the Respondent's pleadings filed in cause number 9412877-A. including the Respondent's Original Answer, Respondent's Amended Answer, affidavits, and exhibits, unless they have been previously forwarded to the Court of Criminal Appeals.

3. this court's supplemental findings of fact, conclusions of law and the order in cause number 9412877-A;

4. the supplemental affidavit of Matthew Alford;

5 any supplemental Proposed Findings of Fact and Conclusions of Law submitted by either the applicant or Respondent in cause no. 9412877-A;

6. the indictment, judgment, sentence, docket sheet, and appellate record in cause no. 9412877, unless they have been previously forwarded to the Court of Criminal Appeals;

7. *Applicant's Objections to the State's Supplemental Proposed Findings of Fact and Conclusions of Law;* and

8. the applicant's *Additional Exhibits in Support of Application for a Writ of Habeas Corpus.*

THE CLERK IS FURTHER **ORDERED** to send a copy of the court's findings of fact and conclusions of law, including its order, to applicant's counsel: Randy Schaffer; 1301 McKinney, St. 3100; Houston, Texas 77010 and to Respondent: Lynn Hardaway; Harris County District Attorney's Office; 1201 Franklin, Suite 600; Houston, Texas 77002.

BY THE FOLLOWING SIGNATURE, THE COURT ADOPTS THE RESPONDENT'S PROPOSED FINDINGS OF FACT AND CONCLUSIONS OF LAW IN CAUSE NO. 9412877-A.

SIGNED this 2 day of Dec, 2008.

/s/ J. Michael Wilkinson
Presiding Judge
179th District Court

OFFICIAL NOTICE FROM COURT OF CRIMINAL APPEALS OF TEXAS P.O. BOX 12308, CAPITOL STATION, AUSTIN, TEXAS 78711

[POSTMARK FEB 4 2010]

Wednesday, February 03, 2010
Re: Case No. AP-76.118
COA#: 14-95-00740-CR
STYLE: CAMPOS EX PARTE CARLOS LUIS

On this day, the Applicant's motion for rehearing has been denied.

Louise Pearson, Clerk

RANDY SCHAFFER
1301 MCKINNEY STE 3100
HOUSTON TX 77010